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Supreme Court, U.S.
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No. 99-615

IN THE

Supreme Court of the United States

PERINI CORPORATION,

Petitioner,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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15 pp

RULE 29.6 STATEMENT

Petitioner, Perini Corporation, has no parent company and its shares are publicly traded on the American Stock Exchange. No publicly held company owns 10% or more of its stock.

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ARGUMENT

(a) State Law is Not the Law of Decision to Interpret the Federal Regulation.

The respondent does not criticize or offer any opposition to the petitioner's position that federal common law should be the law of decision in this case based upon the national scope of the Federal Government's vast local grant procurement program; President Reagan's direction for uniformity in federal procurement grant programs; that the Federal Government's procurement policies are so settled under federal authority that they may not be defeated or limited by state law; that when the United States disburses its funds, it is exercising a constitutional function which should not be subject to diversified local disposition of the states, territories or of cities, towns or hamlets; that the language of the Federal Regulation's Changes Clause promises an equitable adjustment to a contractor; and that the broad scope of the Congressional mandate, that the Changes Clause supersedes all conflicting provisions of the contract, pre-empts the application of state law in this matter.

Despite the above, and without regard to the fact that there are no New York State appellate cases that interpret the Federal Regulation (only two lower court cases that applied federal common law to construe the exact Federal Regulation, see, Petition, FN 3 at 27), respondent is steadfast in its argument that the strict interpretation given to the standard clauses of its boiler plate contract by the New York courts should be applied to interpret the liberal Federal Regulation.

However, respondent's argument is not in accord with Honeywell v. United States, 661 F.2d 182, 186 (Ct. Cl. 1981) wherein the Court of Claims states a different view:

> Plaintiff misunderstands the difference between interpretation of a contract and interpreting a regulation or statute. In case of the latter, the Court's duty is to effectuate the intent of the promulgators of the regulations or statute. [citation omitted] A contract clause is construed in order to give it the effect intended by both parties. These are mutually exclusive rules of construction. The fact that a regulation may be incorporated into a contract does not require a different rule for regulation interpretation.

Here the intent of the promulgators of the Regulation is codified in the Changes and Supersession Clauses, which set forth EPA's objective and policy, that the contractor "shall" be entitled to an equitable adjustment. Such policy supersedes all conflicting provisions of the respondent's contract, upon which it relies.

(b) If State Law is the Law of Decision Herein, There are No New York Cases that Construe the Federal Regulation and New York Would Look to and Apply Federal Common Law.

The City further advances New York law should apply as "there is extensive New York case law addressing

the interpretation of the contractual notice provisions". See, Respondent's Brief at 15.

However, the New York law that the City refers to is not the "precise" law interpreting the Federal Regulation. See, Francis v. INA Life Ins. Co., 638 F.Supp. 117, aff'd, 809 F.2d 183 (2d Cir. 1987), Petition at 26, but law addressing the standard boiler plate provisions of the contract which provisions conflict with and are contrary to the intent and purpose of the Federal Regulation. The City does not refute Perini's statement that there are no New York appellate cases that construe the precise Federal Regulation.

The holdings in the Linan-Faye Const. Co., Inc. v. Housing Auth. of the City of Camden, 49 F.3rd 915 (3d Cir. 1995) and Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41 (4th Cir. 1987), cited by the respondent do not support its position. Such cases hold that where there is no state law that interprets a Federal Regulation, the state courts would look to federal common law to interpret the Regulation. The court in Linan-Faye noted that "if New Jersey law were to apply, New Jersey courts would look to...federal common law...." Id. at 922. The court in Brinderson noted, "the Supreme Court of Virginia, if called upon to construe or apply this federally mandated provision, would look to the existing body of precedents. That collection of precedents is federal...." Id. at 45.

Further, the respondent does not state what law the courts of New York would apply to construe a Federal Regulation. Contrary to its argument, if the courts of New York were called upon to interpret a Federal Regulation, the

courts, as did the two New York lower court cases, would look to federal common law, see, Fermaglich v. Levine, 41 A.D.2d 10, 341 N.Y.S.2d 394, 402 (3d Dep't 1973), ("with certain possible exceptions the rule in New York State is that our courts will give effect to the interpretations of a federal statute [given] by a Federal Court."); Consol. Edison Co. of New York, Inc. v. Town of Red Hook, 60 N.Y.2d 99, 468 N.Y.S.2d 596 (1983), ("where local laws prohibit what would be permissible under [federal] law...or impose "prerequisite additional restrictions...so as to inhibit the operation of the [Federal Government's] general law", federal common law should be applied.)

(c) The Contract Provisions Relied on by the Respondent are Pre-empted by the Regulation's Supersession Clause.

Respondent advances that its strict notice requirements are compatible with and do not conflict with the pre-notice requirements of the Federal Regulation and the pre-emptive effect of the Supersession Clause is applicable only when there is an irreconcilable conflict between the two provisions, citing to Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996). Such argument advances, in effect, that its contract provisions should be given equal standing with the Federal Government's regulation.

This position is contrary to this Court's comments in Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 50 (1982): "Cities are not themselves sovereign;

they do not receive all federal deference of the states that create them... the states' subdivisions generally have not been treated as equivalents of the states themselves." The respondent's argument that its contract provisions should be equally considered with the Federal Regulation is without merit.

Further, in Barnett, the pre-emption under consideration was based upon a clash between a federal and state statute, not upon an express supersession clause here present.

While an irreconcilable conflict may be a requirement for pre-emption under circumstances where a federal and state statute address the same issue, that is not the law when considering an express supersession clause.

As noted in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947), wherein the Court addressed a clash between a federal and state regulation concerning warehousemen, and the federal government had adopted a regulation reserving to itself exclusive control, the warehousemen "could not be required by a state to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act." See, also, City of New York v. F.C.C., 486 U.S. 57 cited in Petition at 24.

In Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991), this Court summarized the rule regarding pre-emption as follows:

> Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that "interfere with,

or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent. Congress' intent to supplant state authority in a particular field may be expressed in the terms of the statute. Absent explicit pre-emptive language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress...touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority. When considering pre-emption, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Even when Congress has not chosen to occupy a particular field, pre-emption may

> occur to the extent that state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," (citations omitted).

The respondent's standard provisions were pre-empted by reason of the expressed Supersession Clause and the presence of an irreconcilable conflict is not a condition precedent to pre-emption. See, also, Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n., 63 N.Y.2d 424, 433-434, 483 N.Y.S.2d 153 (1984).

In the instant matter, the Federal Government reserved to itself exclusive control by reason of the express Supersession Clause. The standard clauses of respondent's contract that require the petitioner to provide more and additional notices and to conform to other standards not required under the Federal Regulation are pre-empted. Pursuant to the Federal Regulation, a contractor must give notice of its intention to file a claim, "within 30 days after receipt of a written change order." Under the contract, the petitioner must give notice, within 10 days after commencement of any condition which is or may cause delay (Article 11), and further, within 5 days after the condition arises and then again 30 days thereafter (Article 27). Without regard to the difference in the number of days within which a contractor must file notice, notice under the Federal

Regulation is required within 30 days "after receipt of the written change order" while notice under the respondent's standard clauses is required when the condition occurred. In this matter, the petitioner, under the respondent's standard clauses, was required to notify the City approximately one to two years prior to the time when notice was required under the Federal Regulation. Pursuant to this Court's holding in Rice, the respondent cannot require the petitioner to do more or additional things, even though its requirements may be compatible.

(d) Delegation of Responsibility to Manage the Project Does Not Authorize the Respondent to Disregard the Changes and Supersession Clauses.

The respondent cites to provisions of the Clean Waters Act and the regulations issued thereunder delegating responsibility for the management of the project as authority for violating the Federal Regulation's provision that the petitioner "shall" receive an equitable adjustment and Congress' mandate that such shall supersede all conflicting provisions of the contract. The Regulation's delegation of responsibility to manage the project does not authorize the respondent to avoid the effect of other equitable remedies specifically provided for and expressed in the Federal Regulation.

The respondent relies on Sante Fe Engineers Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986) and Reliance Insurance Co. v. United States, 20 Cl.Ct. 715 (Ct. Cl. 1990),

aff'd, 931 F.2d 863 (Fed.Cir. 1991) for the proposition that "federal agencies in fact are free to place cost limitations on change orders [included in another federal regulation] issued pursuant to the Changes Clause." See, Petition at 20.

However, the respondent does not show how these cases stand for authority for the respondent, as opposed to the controlling federal agency, to place cost or other limitations on the Federal Regulation. It should further be noted that the revisions to the Changes Clause were not contained in another regulation but were effected by the direct amendment to the Changes Clause itself.

(e) Federal Common Law is Applicable to Interpret a Contract Containing the Federal Regulation Entered into Between Private Parties.

The City argues that Boyle v. United Technologies Corp., 487 U.S. 500 (1988) is inapplicable to this matter for, "unlike the defendant in Boyle, who was a Government contractor...Perini contracted with the City...." Respondent's Brief, FN 6 at 13.

However, the Boyle case, as here, involved an action between private parties involving a Federal Government contract. The court noted that "it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one--even though the dispute is one between private parties." 487 U.S. at 506. The fact that the City's procurement policy on federally funded projects increases the costs of construction to the Federal

Government requires the application of the principles held in Boyle in the instant matter.

CONCLUSION

Based upon the far reaching national effect of this matter it is respectfully requested that Perini's Petition for a Writ of Certiorari be granted.

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by the Governor and, therefore, will apply within State waters of the Sanctuary upon the effective date of these regulations.

The following is the text of the March 20, 1997, letter from the Governor of Florida to the Secretary of Commerce. Per the Governor's request, the letter is followed by the text of the Resolution passed by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (Board of Trustees). The Resolution was adopted on January 28, 1997, and provides the basis for many of the items in the Governor's certification.

***32155** Lawton Chiles

Governor

State of Florida

Office of the Governor

The Capitol

Tallahassee, Florida 32399-0001

March 20, 1997.

Honorable William M. Daley, Secretary, United States Department of Commerce, Herbert C. Hoover Building, 14 Street and Constitution Avenue Northwest, Washington, DC 20230.

Dear Mr. Secretary:

On January 28, 1997, the Florida Cabinet and I, sitting as the Board of Trustees of the Internal Improvement Trust Fund, adopted a resolution to include state sovereign submerged lands

within the boundary of the Florida Keys National Marine Sanctuary (FKNMS). It is our intention to create a partnership with the National Oceanic and Atmospheric Administration (NOAA) for management under the provisions of the FKNMS Management Plan and the Memoranda of Agreement included in the management plan, with certain conditions to be applied to the portions of the sanctuary within Florida Territorial Waters. A copy of the resolution is enclosed. We request that the resolution be placed in the preamble to the final notice for the FKNMS regulations.

In accordance with subsection 304(b)(1) of the National Marine Sanctuaries Act and that resolution, the following terms are certified as unacceptable in state waters:

1. Sanctuary fees for allowed public uses unless first approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida.

2. Sanctuary emergency regulations unless and until first approved by the Governor. Accordingly, the following sentence shall be added to section 922.165 CFR as published January 30, 1997: "Emergency regulations shall not take effect in Florida territorial waters until approved by the Governor of the State of Florida."

3. Requirements for governmental entities within the state, including but not limited to the State of Florida and Monroe County, to provide funding for the implementation of sanctuary regulations or other actions.

4. Sanctuary fisheries regulations unless established by the Florida Marine Fisheries Commission following promulgation under the provisions of section 370.025(2), F.S. (1995), which requires public input and final approval by the Board of Trustees

of the Internal Improvement Trust Fund of the State of Florida. Accordingly, the following sentence shall be added to section 922.42 CFR as published January 30, 1997: "Any fishery regulations in the Florida Keys National Marine Sanctuary shall not take effect in Florida Territorial Waters until established by the Florida Marine Fisheries Commission."

5. Sanctuary regulation of discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, if the discharging or depositing is authorized under Monroe County land use permits or under state permits. Accordingly, 15 CFR section 922.163(a)(4)(ii), concerning prohibited activities, shall be amended to read as follows: "Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except those listed in paragraph (a)(4)(I) (A) through (D) of this section and those authorized under Monroe County land use permits or under state permits."

6. The implementation of any additional ecological reserves or any other type of zoning or regulation unless first approved by the Board of Trustees. Accordingly, the following provision shall be added to 15 CFR section 922.163 as published January 30, 1997: "(h) Any amendment to these regulations shall not take effect in Florida Territorial Waters until approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida;" and the following provision shall be added to 15 CFR section 962.164: "(f) Additional wildlife management areas, ecological reserves, sanctuary preservation areas, or special use areas, and additional restrictions in such areas, shall not take effect in Florida Territorial Waters unless first approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida."

7. Implementation of the management plan in its entirety unless the Co- Trustees agreement is amended to provide as follows:

a. The Florida Department of Environmental Protection (FDEP) employee who has been designated by the Secretary of FDEP and confirmed by the Board of Trustees shall represent the Board of Trustees as an equal partner to work in consultation with the Sanctuary superintendent for the oversight of Sanctuary operations.

b. The FDEP and NOAA shall manage the FKNMS through a cooperative partnership and consult on all management activities throughout the Sanctuary. The intent of this partnership is that the final resolution of any management issues resulting in policy conflicts between the state and NOAA shall be decided by the managing partners consistent with state and federal laws.

c. The state reserves the right to initiate proposed changes to the plan, and NOAA, if necessary, shall initiate the federal rule promulgation process required to make revisions to sanctuary regulations requested by the Board of Trustees.

d. Section 304(e) of the National Marine Sanctuary Act requires the Secretary of Commerce to review the management plan and regulations for the Sanctuary every five years, evaluate the substantive progress toward implementing the management plan and goals for the Sanctuary; especially the effectiveness of site-specific management techniques, and revise the management plan and regulations as necessary to fulfill the purposes and policies of the Act. When the management plan and regulations for the FKNMS are re-evaluated, the Secretary of Commerce will re-propose the management plan and regulations in their entirety and the State of Florida will have the opportunity to review the management plan and regulations, in their entirety, and indicate if any or all of the terms are

unacceptable, in which case the unacceptable terms shall not take effect in state waters.

Accordingly, the following provisions shall be added to 15 CFR section 922.160: "Section 304(e) of the NMSA requires the Secretary to review management plans and regulations every five years, and make necessary revisions. Upon completion of the five year review of the Sanctuary management plan and regulations, the Secretary will repropose the regulations in their entirety with any proposed changes thereto, including those regulations in subparts A and E of this part that apply to the Sanctuary. The Governor of the State of Florida will have the opportunity to review the re-proposed regulations before they take effect and if the Governor certifies such regulations as unacceptable, they will not take effect in State waters of the Sanctuary."

We also call to your attention the now erroneous reference in section 922.166(b)(2)(iii) to the Submerged Cultural Resources Agreement contained in Volume 1 of the management plan. We suggest striking that reference. The final agreement is that considered by the Board of Trustees on January 28, 1997 and executed by the signatory parties.

We believe that implementation of the plan provides balanced, common sense protection of this fragile, unique and endangered marine treasure and advances the state and federal commitment to jointly manage these resources. We look forward to that continuing relationship.

With kind regards, I am
Sincerely,
Lawton Chiles
LC/khw/mlp

Enclosure

cc: Honorable Frank Brogan
Honorable Bob Butterworth
Honorable Bob Crawford
Honorable Debbie Horan
Honorable Bob Milligan
Honorable Sandra Mortham
Honorable Bill Nelson

Resolution [omitted]

* * *

APPENDIX "2"

Excerpt from Brief of the United States, *United States of America v. Kane Fisher, et al.*, No. 97-5800, August 31, 1998, pp. 30-32.

* * *

C. The Sanctuary Act took effect when Congress designated the Sanctuary. – As Fisher concedes (Br. 28), in his previous appeal to this Court, a major contention was whether or not Congress' designation of the Sanctuary "took effect" when the Sanctuary Act was enacted or would be deferred until NOAA had issued regulations for the Sanctuary. This Court unequivocally held that the Sanctuary came into existence when the Sanctuary Act was passed. 22 F.3d at 268-268. Notwithstanding this holding, Fisher reasserts this argument in the instant appeal.

In our previous brief before this Court, we explained that the starting place for determining whether the Sanctuary has been established is the language of the Sanctuary Act itself. See Hallstrom v. Tillamook County, 110 S.Ct. 304, 308 (1989). That language speaks repeatedly in terms of immediate effect. In Section 5, the Sanctuary Act provides that the area described in the statute "is designated as the Florida Keys National Marine Sanctuary * * *." The Sanctuary shall be managed and regulations enforced under all applicable provisions of [of the MPRSA] as if the Sanctuary had been designated under such title." Sanctuary Act § 5(a) (emphasis supplied). The clear import of this language is reinforced by the presumption that statutes are to take effect immediately unless Congress clearly states otherwise. Gozlon-Peretz v. United States, 110 S.Ct. 840, 846 (1991).

Notwithstanding this Court's previous holding and the plain language of the Act itself, Fisher maintains (Br. 30-31) that the Act was meaningless until NOAA issued final regulations for the Sanctuary's management. Fisher bases (Br. 31-32) his argument on the fact that NOAA submitted its final

regulations for review to Congress. This review was intended, in part, to give Congress the opportunity to hold hearings on the Sanctuary's management. Although this Court previously held that NMSA did not require NOAA to submit these regulations to Congress, as a matter of policy NOAA did submit these regulations to Congress. Ultimately Congress did not hold hearings on these regulations although NOAA officials did meet with congressional aides regarding jet ski operations within the Sanctuary. See 62 FR 32154, 32158-159 (June 12, 1997).

The fact that NOAA submitted its regulations to Congress for review does not mean, as Fisher asserts (Br. 31), that the existence of the Sanctuary depended on Congressional action. To be sure, the 45 day review period set forth in 16 U.S.C. 1443 is intended to give Congress the opportunity to review a sanctuary administratively designated by the Secretary. This Sanctuary, however, was not administratively designated by the Secretary; it was created by Congress in a law passed by both Houses and signed by the President.[22] In other words, the law which established the Sanctuary had already been enacted and taken effect. Even if Congress now wanted to "veto" the Sanctuary, it could not do so except by enacting new legislation. See INS v. Chadha, 462 U.S. 919 (1983) (holding the so-called "legislative veto" unconstitutional).

In sum, Fisher's argument that the Sanctuary designated by Congress in 1990, may only take effect after NOAA has published regulations for the Sanctuary is without merit. There are sound legal and policy reasons why NOAA sends it management plans and regulations to Congress before they become legally enforceable. NOAA's responsible action in this regard does not mean, as Fisher asserts (Br. 31), that the Sanctuary did not take effect until 1997.

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[22] See also U.S. Brief in Fisher v. United States, No. 92-4799, pp.22-39.